



# ETHICS UPDATE U.S. VIRGIN ISLANDS

Professor Laurie L. Levenson

Loyola Law School

2020

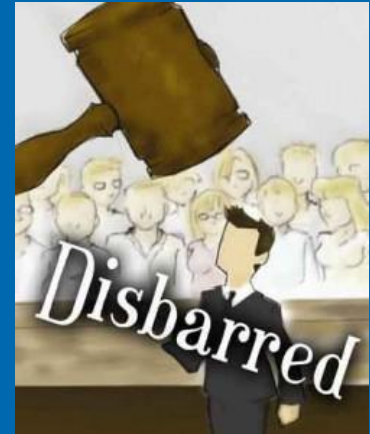
# Staircase to Heaven



Ethics & Beyond

# Ethics

- Staying out of the dungeon
- Keeping your practice alive
- Reaching for heaven



# But first ... what's new?

- Which of the following changes occurred in 2019?
  - A. New conflict rules
  - B. New rules for compensation
  - C. New rules for judicial ethics;
  - D. All of the above.





# STAYING OUT OF THE DUNGEON



# CONFLICTS OF INTEREST



# Basics of Conflicts of Interest



# Attorney's Duties to Client

- 2 Basic Duties:
  - Duty of Loyalty
  - Duty of Confidentiality





# Types of Conflicts

- Client v. Client  
(concurrent)
- Client v. Client  
(former)
  - “substantially related”
- Client v. Attorney  
(financial or  
personal interests)



# Conflicts with Current Client

- Rule 211.1.7: A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.

# Hypo #1

## Ahoy Matey

- P1 injured herself when chartering a boat around the island. She sues both the captain D1 and the owner D2 of the boat. D1 and D2 agree that the captain is an independent contractor.
- Can the same attorney represent both Ds?



# Concurrent clients

- Roncone v. Hazzard (D.V.I. 2019)
- Smith-Russo v. Top Sails, Inc., (D.V.I. 2019)





# Rule 1.7 [Comments]

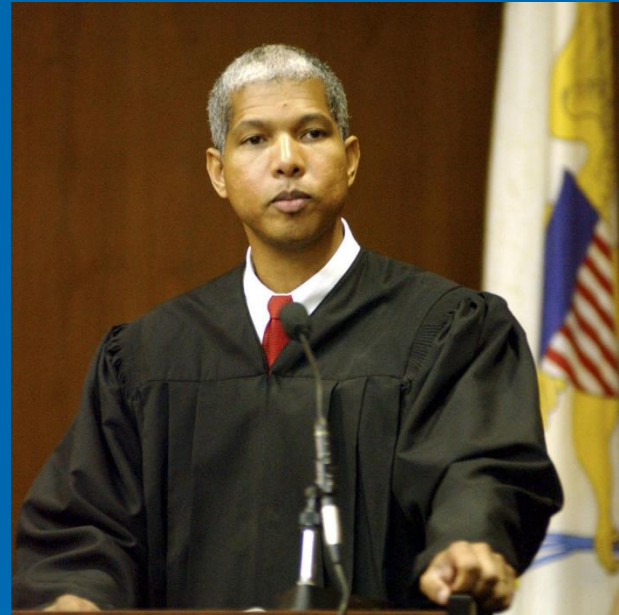
- [A] lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions."

# Denero v. Palm Horizons Mgmt.

2015 WL 5012126 (D.V.I. 2015)

➤ Analyzing whether there is a conflict of interest:

- Anticipating defenses
- Anticipating trial presentation



# Thinking about the conflict

- What are the likely defenses?
- Who will be called as witnesses?
- Will counsel end up cross-examining its own party-witness?
- What arguments might be raised in settlement discussions?



# What about waiver?

## Rule 211.1.7(b)

A conflict can be waived if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.



# Requirements for Valid Waiver

- **Informed consent**
- Consultation with independent counsel
- **Written waiver**



# Disqualified from Representing Either Client!!



# OTHER CONFLICTS

Atty. vs. Former Client



# Hypo #2

## Knock on Wood

➤ Attorney has been asked to represent condo owners who plan to sue D over construction defects. Attorney once worked for the firm representing D, but never on construction cases.



➤ Can she represent the condo owners? Can her partners?



# Conflicts with Former Clients

- Rule 211.1.9: A lawyer who has formerly represented a client shall not thereafter represent another person in the same or a substantially related matter ... unless the former client gives informed consent, confirmed in writing.
- A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client.
- A lawyer who has formerly represented a client shall not thereafter use information to the disadvantage of the former client.

# Imputed Disqualification

- Rule 211.1.10:
  - While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.



# OTHER CONFLICTS

Atty. vs. Client



# Hypo #3

## Lend me a Hand

- SPB Bank sues D for failure to pay a loan. D hires an attorney who used to help the bank with loan collections. The attorney currently has his own loan application pending before the bank.
- Is the attorney disqualified?



# Hypo #4

## Bad advice?

- Plaintiff is suing D for breaching a lease. D's lawyer for the litigation is the same lawyer who advised D on how to handle the transaction.
- P moves to disqualify D's lawyer claiming that the lawyer has a conflict of interest because counsel knows he will be subject to a malpractice claim if his client admits the breach.
- How should the court rule?



# Rule 211.1.7

## [Comments]

- Lawyer's own interests in a case may create conflict. However, where there is no direct adverseness, a conflict of interest only exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.
- Critical questions:
  - Is it likely that a difference in client's interests and lawyer's interests will eventuate?
  - Is it likely that such a conflict will materially interfere with the lawyer's independent professional judgment in considering alternatives and courses of action to be pursued on client's behalf ?



## But note ...

### ➤ ABA Formal Op. 481 (Apr. 17, 2018):

- A lawyer has a duty to inform a current client if he or she has made a material error.
- No similar requirement for former client if lawyer discovers error after attorney-client relationship has ended

### ➤ Fenster v. Dechabert (2017 V.I. Lexis 149)

- Conflict had not materialized
- Counsel reminded to get informed, written consent

# Hypo #5

## Defending Yourself

- You are a criminal defense lawyer and your client pleads guilty. Now, he wants to withdraw his plea. He hires a new lawyer who alleges ineffective assistance of counsel. You know the allegations are false.
- What can you do? File a response with the court? Tell the prosecutor?



# Rule 211.1.6(b)

➤ A lawyer may reveal information reasonably necessary to:

(5) defend a criminal charge or civil claim against the lawyer;

(6) to comply with other law or a court order.

# Hypo #6

## Lawyer as a witness

- Plaintiff sues defendant for fraudulent representations in a business deal. P's lawyer was in the room when the allegedly false representations were made.
- Defendant moves to disqualify plaintiff's lawyer because he could be called as a witness in the case.



# Thomas v. Kragel

## 2018 V.I. LEXIS 132

### ➤ Rule 211.1.7

- A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
  - The testimony relates to an uncontested issue;
  - The testimony relates to the nature of legal services rendered;
  - Disqualification of the lawyer would work substantial burden on the client.



# Hypo #7

## Joint representation

- Plaintiffs have sued multiple defendants. Defense counsel jointly represents all of the defendants and is paid by the same third party to do so.
- One of the defendants wants to settle out, but the other defendants and third party want to fight the case.
- Can counsel continue to represent the other defendants?






# Additional Issue

- Does not matter who pays for representation (Rule 211.1.8(f))



# OTHER CONFLICTS

Atty. vs. Client  
Positional Conflicts

The background of the slide features several sets of concentric circles, resembling ripples in water, rendered in a lighter shade of blue than the background. These circles are positioned in the lower half of the slide, with one set on the left, one in the center, and a larger one on the right.

# Hypo #8

## It is a Matter of Principle

- Attorney is a well known sexual harassment lawyer. However, when a friend of hers is sued, she agrees to represent him even though the legal positions she is likely to take in the class may negatively impact her clients' future cases.
- Can she handle the case?



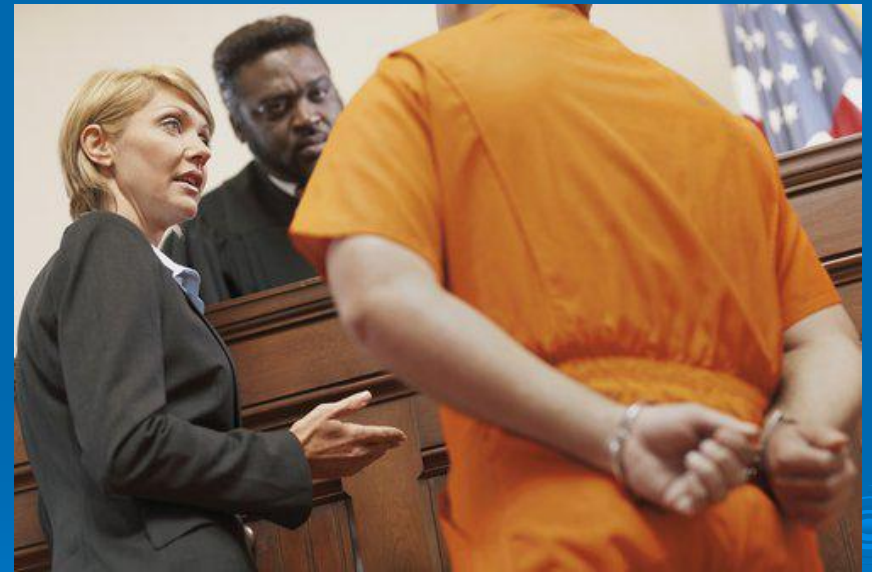
# Positional Conflicts

- V.I. Rule 211.17(a)(2): Lawyer's personal interests can create concurrent conflict
- Will you be able to zealously represent each client?

# Hypo #9

## New Prosecutorial Duties

- The defendant chooses to represent himself in a misdemeanor case.
- The prosecutor tells D, “Take his plea and you are done, you can go home now.”
- However, the prosecutor knows that the conviction could trigger future enhancements
- Does the prosecutor have a duty to disclose those consequences?



# ABA Formal Opinion 486

- Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor Offenses
- Special Role of Prosecutors
  - V.I. Rule 211.3.8
  - Rule 3.8(g), (h): Duties after conviction



# COMPETENCY



# Hypo #10

## No Good Deed Goes Unpunished

- You run into your friend at the courthouse and he seems to be intoxicated. He begs you to handle his matter. Without any preparation, you appear on the case. It does not end well.
- Have you violated your ethical duties?



# Rule 211.1.1

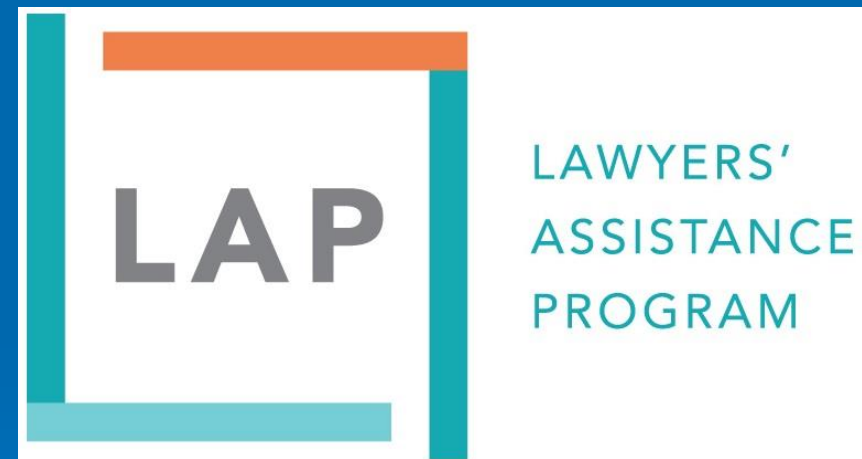
## Competency

- A lawyer shall provide competent representation to a client.
- Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

# V.I. Rule 11.8.3

## Reporting Professional Misconduct

- Duty to report violation of Rules of Professional Conduct to Bar
- “Raises substantial question as to lawyer’s honesty, trustworthiness or fitness”
- Exception for lawyers assistance programs



# Hypo #11

## “Too busy for your own good”

- Counsel was a busy lawyer. Like many other busy lawyers, he works on cases he likes first and procrastinates on cases that are more difficult or involve difficult clients. Because he is behind, he avoids clients' calls.



- Has counsel violated the ethical rules?

# Rules for Competency

- Diligence
- Competent on law and procedures
- Preparation
- Communication with client
- Familiarity with technology
- *In the Matter of the Suspension of Maynard, 68 V.I. 632 (2018)*





# Rule 211.1.3

## Diligence

- A lawyer shall act with reasonable diligence and promptness in representing client



# Rule 211.1.4

## Communication

- A lawyer must keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests of information from the client.



# Hypo #12

## Competency 20.0

- Your office computer system is hacked. Confidential information is taken.
- Are you in trouble? Do you need to notify your clients?



# Formal Op. 483 (Oct. 17, 2018)

- Attorney's responsibility to use "reasonable efforts" to protect confidential information
- Must monitor for a data breach
- Have incident response in place
- Duty to notify current clients
- Get waiver of former clients if you keep records

# CANDOR TO THE COURT



# REPUTATION IS EVERYTHING!





# Hypo #13

## “Just a detail”

- Attorney Jane submits a report to the court that misrepresents some of the filings in the case.
- When the error is discovered by the court, she claims that the error was made by her paralegal.
- Is there an ethical problem?



# Rule 211.3.3

## Candor toward the Tribunal

➤ A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

# Rule 211.3.3

## Candor toward the Tribunal

➤ A lawyer shall not knowingly:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

# Hypo #14

## Witness surprises

- Much to your surprise, one of the key witnesses changes her story during her testimony. It suddenly becomes much more favorable to your case than what she told you in your office during trial prep.
- Is this a problem?



# Rule 211.3.3

## Candor toward the Tribunal

➤ A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

# Hypo #15

## Don't assume facts

- You have generally discussed settlement with your client, but you are so eager to dispose of a case that you do not run a specific offer by the client before contacting opposing counsel and filing a settlement notice with the court.



- Is this a problem?



# V.I. Rules 211.1.2 & 1.4

- Scope of Representation and Allocation of Authority Between Client and Attorney
- Communication
- Williams v. Powell (V.I. Super. 2018)

# Hypo #16

## Off Limits

- You have been trying hard to settle a case between your client and his former business partner, but opposing counsel doesn't seem to be sharing your offer with his client.
- Therefore, you ask your client to talk to his former partner and let him know that his lawyer has become a problem.
- Is this ethical?



## Rule 211.4.2

- “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

# KEEPING YOUR PRACTICE ALIVE & ETHICAL



# Handling Fees



# Hypo #17

## Careful about Commingling

- Attorney A represents the estate of a former client. When necessary, he takes loans from the estate to cover some of his practice expenses, but he always pays them back.



- Is this ethical?



# V.I. Rule 211.1.15

## Safekeeping Property

- Lawyer shall hold property of client or third persons separate from lawyer's own property
- Client must keep strict client trust account records (V.I. Rule 211.1.15-1)

# Professional Transitions

,



# Hypo #18

## Time to Withdraw

- You have worked hard for your client, but she still hasn't paid your bills. The only thing left in the case is to file post-hearing motions, but you don't want to work one more day without getting paid.
- Can you withdraw?



# Mandatory Withdrawal

## Rule 211.1.16(a)

➤ Lawyer shall withdraw if:

(1) the representation will result in violation of the Rules of Professional Conduct

# Permissive Withdrawal

## Rule 211.1.16(b)

- Lawyer may withdraw if:
  - No material adverse effect on client's interests
  - The representation will result in an unreasonable financial burden on the lawyer
  - Other good cause for withdrawal
  - Must get permission of tribunal and take steps to protect client's interests

# Cianci v. Chaput (V.I. 2016)

- Fee disagreement may justify withdrawal
- But court can deny if contrary to judicial economy

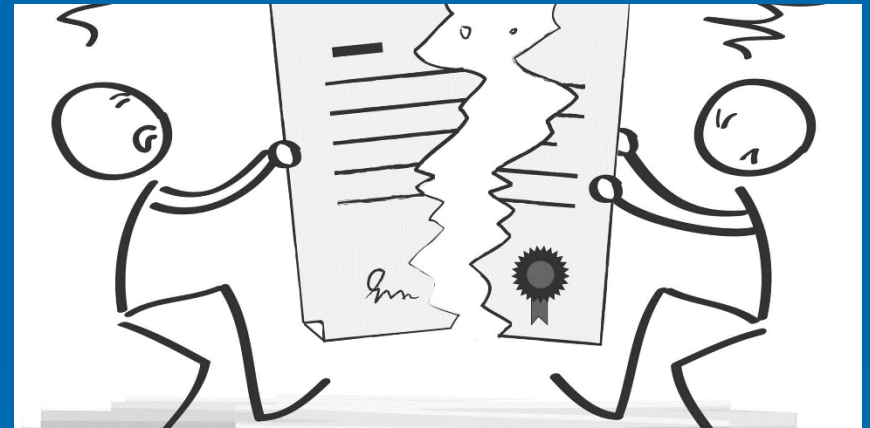




# Hypo #19

## Splitting Up is Hard to Do

- You have decided to resign from your firm. Knowing that you are leaving, you send a letter to the clients saying that you will be taking their cases with you. You also download all of your clients' files without notifying the firm.



- Have you acted ethically?

# Lawyer's Obligations When Changing Firms

- ABA Formal Opinion 489:
  - Lawyers do not own clients
  - Joint notification
  - Handling of confidential information
  - Handling of law firm's property
  - Advertising vs. Solicitation
  - Keeping lists for conflicts

# Hypo #20

## Pro Hac Vice

- Everyone loves the Virgin Islands and wants to practice in its courts.
- Local counsel works with a DC firm on a case. The DC lawyers apply for pro hac vice status, but never take the oath.
- Is this a problem?



# Must Take Pro Hac Vice Oath

- In the Matter of Jindal, 69 V.I. 942 (2018)
- In re Kershaw, 70 V.I. 859 (2019)
- V.I. Rule 211.5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

# CIVILITY



**KEEP  
CALM  
AND  
RESPECT  
OTHERS**

# Hypo #21

## Being civil to opposing counsel

- You don't think that opposing counsel is taking you seriously during settlement discussions
- You send them an email that says that "you Mother F@#ker Co%k Suck@r better start settling in good faith."





# Consequences of Incivility

- V.I. Rule 211.8.4: Misconduct to engage in conduct that reflects adversely on lawyer's fitness as a lawyer
- Disqualification, Discipline, Local Rules violation
- Christopher Hook "confidential negotiating tactic"

# Rule 211.8.3

## Reporting Professional Misconduct

- Can report, but not “threaten” to report
- Careful with the “warning”



# Hypo #22

## “The Golden Rule”

- One of your colleagues continues to speak in a patronizing manner to the women lawyers and administrative staff in your office.
- Do you have any duty to interfere?



# Raise your hand if ...

➤ You or someone you know has been subject to an inappropriate remark because of your:

- Gender
- Race
- Sexual orientation
- Ethnicity
- Dress
- Weight
- Age



# ABA Rule 8.4 (Adopted 2018)

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

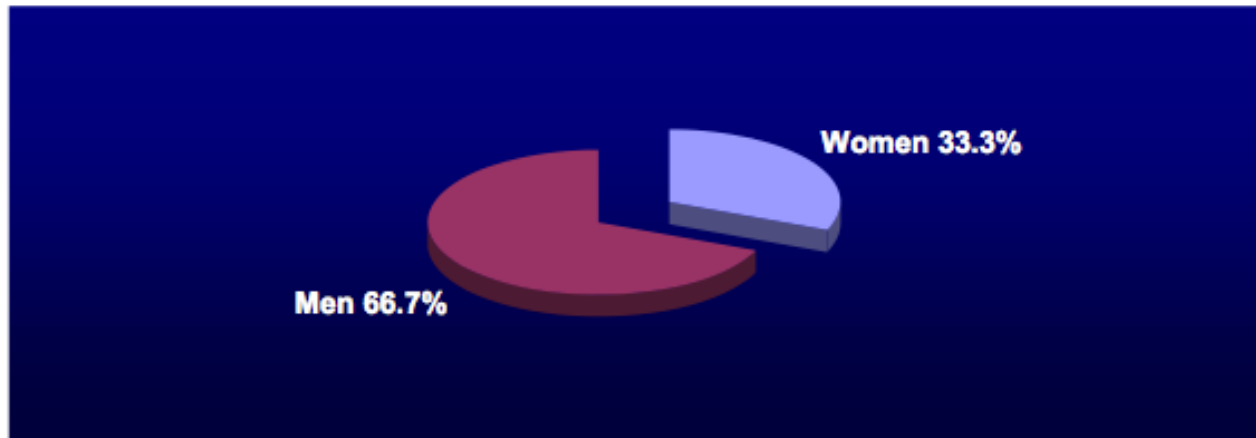


# Improving our Profession





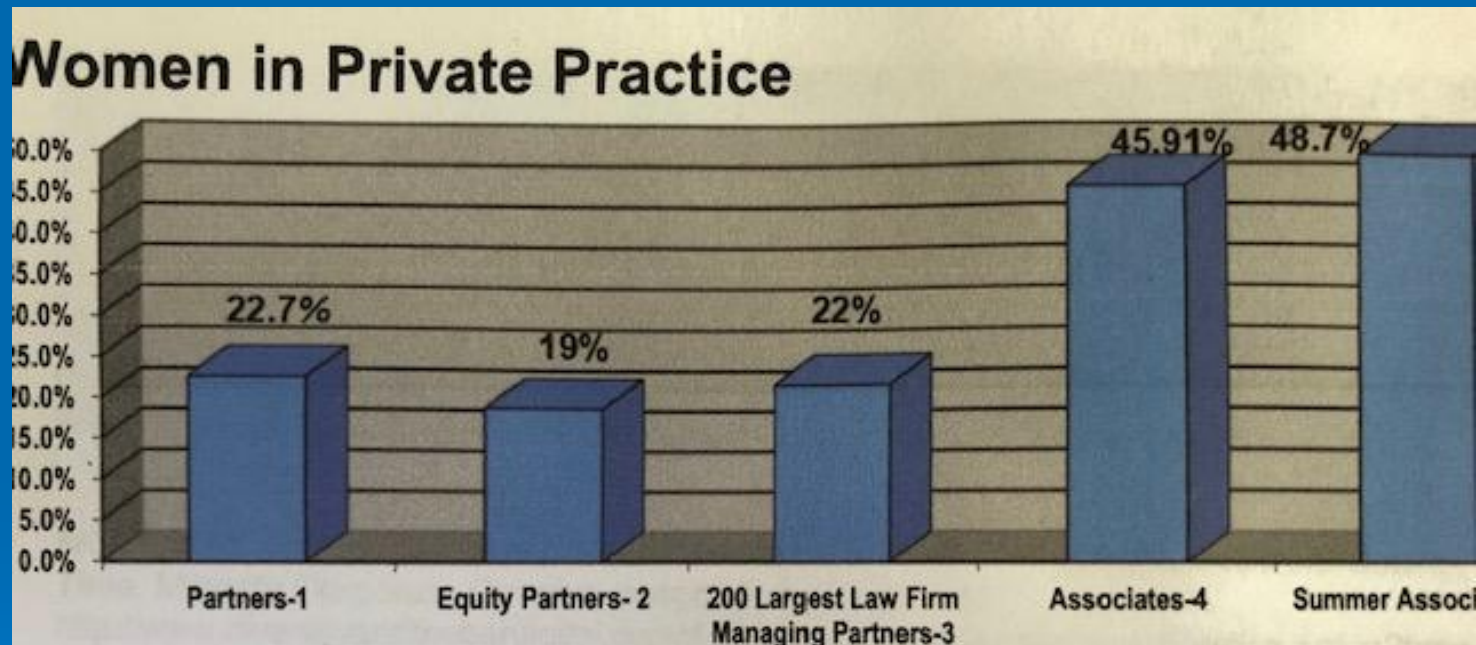
## Women in the Legal Profession



American Bar Association Market Research Department, April 2012

Note: 44 states, representing 59% of the lawyer population, reported gender statistics.

# Women in the Legal Profession 2019 Report



# ELIMINATION OF BIAS

## **Bias in the Legal Profession**

- **73% of female attorneys reported gender bias in legal workplaces as a major or moderate problem.**

**The four examples of gender bias women agreed occurred most:**

- **70% - comments are made about the physical appearance or apparel of female attorneys when no such comments are made about male attorneys.**
- **69% - asked if they are attorneys when male attorneys are not.**
- **61% of women somewhat or strongly disagreed that they are able to advance as far as male attorneys in the legal profession.**
- **67% of female respondents perceived there was less gender bias against women today than over the preceding five years.**

# Taking the High Ground

- Opposing counsel and his client have used social media and the press to attack your case.
- Is this unethical?
- How should you respond?
- What is the best approach to client control?



# Virgin Islands Rules of Prof. Conduct

## ➤ 211:3.6 -- Trial publicity

- “Shall not make an extrajudicial statement that the lawyer knows or reasonable should know ... will have a substantial likelihood of materially prejudicing adjudicative proceeding.”

## ➤ 211:3.5 -- Impartiality and Decorum of Tribunal

- “Shall not seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.”



# CLIENT CONTROL





# Hypo #23

## Ungrateful Client

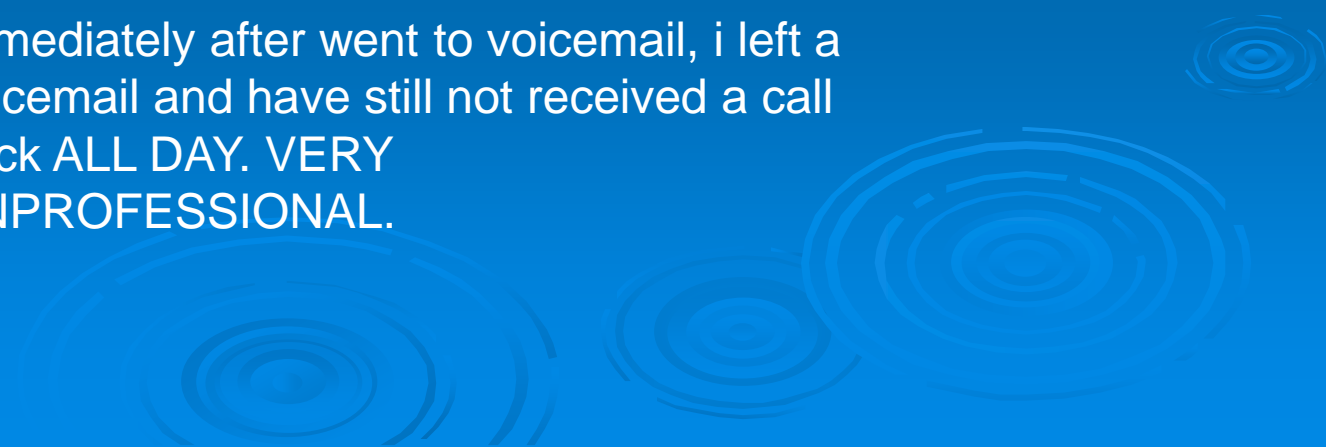
- Your former client posts negative reviews of your services on Yelp and ABBO. It is terribly unfair and you're sure that if people knew all the dirt about your client and his case, they would discount the review.
- Can you respond?



## Share review

Very unprofessional!

I called a day prior to my court date and was told over the phone to pay a fee to take on my case, payment went through, i was told not to show up in court today as my lawyer would be representing me. I decided to go anyways and when i arrived to the court my lawyer was no where to be found. Called several times and was told my lawyer was there, when called to speak to the judge my lawyer STILL WAS NOWHERE to be found! Called them immediately after went to voicemail, i left a voicemail and have still not received a call back ALL DAY. VERY UNPROFESSIONAL.



# The one thing you cannot do ...

## ➤ Rule 211.1.6:

- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

# Duty of Confidentiality

- V.I. Rule 211.1.6: Lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.
- ABA Model Rule 1.6, Comment [3]: Confidentiality duty applies to all information relating to representation, even if it could be obtained from public sources.
- ABA Formal op. 479 (2017)



# Post-Termination Disclosures

- Duty to protect confidences and secrets continues, even if information available from public source
- ABA Rule 1.6, Comment [20]: Duty of confidentiality continues after client-lawyer relationship has terminated.

# DEALING WITH JUDGES





# Hypo #24

## Respecting Judicial Boundaries

- You are excited because you just hired a law clerk who worked for the judge handling one of your biggest cases. You don't plan to assign the clerk to that case, but you will have him come to watch the proceedings.
- Have you done anything improper?
- Hamed v. Yusuf, 2018 WL 1320364 (V.I. Super. 2018)
- V.I. Rule 211.1.12: Former judge, arbitrator, mediator or third-party neutral



# Hypo #25

## The Judge is My BFF

- The V.I. judges are very friendly and frequently attend Bar social events.
- You are afraid that if you are too friendly, they might recuse themselves from your case.
- When will a judge be required to recuse?



# Ethical Concerns

- Ex parte communications
- Recusal of judge if “impartiality might reasonably be questioned.” Canon 3C

# ABA Formal Opinion 488

## ➤ Acquaintances

- Church, school, bar meetings

## ➤ Friendships

- Mentor, regular calls, socialize, gifts

## ➤ Close personal relationships

- Relation or romantic interest



# CHALLENGES FOR THE FUTURE





# Access to Justice and Community Education





THANK YOU

